

March 9, 1994

P.S. Protest No. 93-30

W.M. SCHLOSSER COMPANY, INC.

Solicitation No. 102498-93-A-0001

DIGEST

Protest against failure to prequalify a firm for a general construction contract is dismissed for lack of subject matter jurisdiction where the protester challenges the prequalification process generally and the regulations which allow the Postal Service to limit the number of prequalified firms; protest is denied where the evaluators' determination that the protester was not one of the most highly qualified firms had a reasonable basis.

DECISION

W.M. Schlosser Co., Inc., (Schlosser) timely protests the contracting officer's decision to exclude it from prequalification as an offeror in the procurement of general contracting services for the interior renovation (restacking) of the Postal Service headquarters building.

The protester objects to the prequalification procedure generally and alleges that its prequalification package was improperly evaluated.

Solicitation 102498-93-A-0001 (prequalification package) was issued to construction firms which responded to a May 23, 1993, announcement in the Commerce Business Daily (CBD).¹ The CBD announcement stated that it was a "notice of intent to prequalify general

¹ Procurement Manual (PM) 3.1.6 c., which authorizes the prequalification process, defines prequalified contractors as "firms or institutions that have previously demonstrated their ability to perform consistently to high standards of quality and reliability" (3.1.6 c.1.) and explains that the "consideration of proposals only from prequalified contractors ensures that selection for award can be made primarily on the basis of

contractors" for the renovation at postal headquarters and stated that the "work involves demolition, renovation and reconfiguration of corporate office environment, and includes but not limited to mechanical, electrical plumbing and structural modifications of approximately 700,000 sf." The synopsis stated that the estimated cost of the project was between \$9 million and \$11 million. Interested offerors were invited to request in writing a prequalification package, to be completed and returned by June 18.² The synopsis also notified offerors that the prequalification statement "will include the evaluation criteria for prequalification and a committee appointed by the contracting officer will evaluate responses" and that "[t]his is not a request for proposal."

The selection, or evaluation, criteria listed in the prequalification solicitation were:

1. General contractor experience including prior Postal experience
2. Project management
3. Financial capability
4. Company organization
5. Minority business participation

The solicitation also listed as "other factors":

- a. Safety
- b. Quality control
- c. Experience in geographic area
- d. References and previous clients

These nine factors were listed on ratings sheets, with space for the evaluators to write P (poor), F (fair), G (good) or E (excellent) under each factor for each firm.

price proposals without undue performance risk." (3.1.6 c.2.) PM 11.5.4 authorizes prequalification of construction contractors and 11.5.4 b. states:

1. When a construction project plan subject to this part is approved under applicable procedures, a request for qualification statements will be published in the *Commerce Business Daily*. The request will generally describe the project and specify any special qualifications required.
2. The [Vice President], Facilities, or authorized designees, will evaluate the statements received and select the most highly qualified firms ~~at~~ (at least three) for solicitation. Solicitation will be limited to those firms so selected.

Construction contracting officers also follow the guidelines of Handbook RE-14, Design and Construction (the RE-14), at Procedures 210.20 and 310.20.

² The May 23 CBD announcement contained a requirement for participation of a minority-owned business. That requirement was deleted in a subsequent CBD notice, which extended the prequalification statement due date from June 18 to July 26.

Part C of the Prequalification Statement, Contractor Background, provided several forms on which the prospective contractor was to fill in information about its general background and its experience. The first form asked the offeror to list comparable renovation/restacking projects completed in the last five years; specific information required included: project name, location, type, references, original dollar amount, final amount, original end date, and actual end date. The second and third forms, respectively, asked for a list of Postal Service projects and projects for other government agencies undertaken in the past five years, even if not completed. For those forms, required information included: project name, location, type, references, original dollar amount, current dollar amount, and percent completed. There was a similar form for contractors to list current major non-government renovation/restacking projects. The fifth form asked the offeror to list its four largest similar projects completed and asked for original and final dollar amounts and original and actual end dates. On a subsequent form, offerors were to list the names, positions, years with the firm, and years of construction experience for specific key personnel. A page entitled "Management" required prospective contractors to attach "a statement describing the company organization," an "employment profile," a description of the contractor's scheduling system, a proposed project organization chart, and "biographical sketches for each key individual."³

The instructions for Part C stated that it was "required that qualifications be presented on the forms furnished below," but informed offerors that more sheets using the same format could be attached "as needed."

Twenty-three prequalification statements were received; of those, two were eliminated as technically unacceptable due to incomplete submissions. The three-member evaluation committee⁴ met in mid-September to evaluate the remaining 21 submissions, and designated six firms other than Schlosser as prequalified. On October 13, all submitters were notified of their prequalification status. The letter to Schlosser did not give specific reasons for Schlosser's failure to prequalify, stating that "due to the competitive nature of the responses, your firm was not considered one of the most highly qualified." Schlosser's protest followed.

The protester states that while the PM allows the Postal Service to "limit competition to three select firms, the manual in no way requires it."⁵ The protester states that it realizes

³ Other Part C forms required firms to fill in financial data, safety (injuries) data, and numbers of federal/state OSHA citations, and to list judgments, lawsuits or claims filed against the firm. Prospective offerors were instructed to "[a]ttach a statement outlining the company's safety program . . . include an organization chart that indicates the various levels of supervision within the Safety Program . . . [p]rovide a resume of the individual(s) responsible to monitor, update, and enforce the company's Safety Program" and to "[d]escribe the company procedures that will be implemented on this project" Offerors also were to attach a statement "outlining the company's Quality Management and/or Quality Control Program" and were to provide resume of individuals responsible for that program.

⁴ The RE-14, Procedure 210.20, Prequalification Planning, states at step 2 that the evaluation committee "should consist of highly qualified professional Postal Service employees who, collectively, have experience in architecture, engineering, construction, and related matters."

⁵ The protester cites GAO precedent as stating that prequalification is unduly restrictive of competition,

that prequalifying contractors is "a highly subjective process," but complains that limiting the number of prequalified contractors "limits the quality of competition and unfairly excludes highly qualified contractors from the procurement." Schlosser claims that it is "extremely qualified" for the work and has had substantial experience with similar projects. Accordingly, it was "completely surprised to learn that it did not prequalify for this project."

The contracting officer's response was written by the chairman of the evaluation committee, who made the following points:

- The evaluators, who met the qualifications of the RE-14 (see footnote 4), followed the procedures set out in PM 11.5.4 and the RE-14.
- Schlosser's protest against limiting the number of prequalified firms is an untimely protest against the terms of the solicitation; its protest against prequalification generally is erroneous in that the PM, which authorizes it, has the force and effect of law.
- In making its determinations, the committee "limited itself to the submissions received, except with regard to references." Based on that review, "the protester was deemed significantly less qualified than the six general contractors we prequalified in the two most important factors we considered, experience and project management."
- Although Schlosser has completed more projects of this type than some of the prequalified firms, the evaluation committee considered the protester's experience "relatively weak because its submission indicates that almost all its projects ran substantially over the original amount and/or [were] completed well beyond the original date."⁶
- For the "key positions" of project manager and project superintendent, the protester proposed persons with "significantly less experience and/or whose backgrounds were less varied and less relevant to the type of project to be undertaken than did the general contractors the committee determined to be better qualified."⁷

even as it admits that under Postal Service regulations, it is allowed.

⁶ The protester included with its prequalification package a five page "letter of introduction," in which it listed details of the firm's experience and accomplishments but did not offer any explanation for the delayed completion dates and increased costs incurred with nearly all of its completed projects. Unlike some of the other offerors, the protester included no reference letters with its submission.

⁷ As examples, the committee chairman states that Schlosser's proposed project manager previously managed only one project "and it is unclear from the protester's submission whether he held that position through the life of the project." Also, the proposed project manager's background is primarily with plumbing and piping work, which "will constitute a relatively minor part of the work involved" in the restacking contract. Finally, the chairman states that Schlosser's submission indicates that the person designated as project superintendent also is "relatively inexperienced;" the six prequalified firms

-- "The relative weakness in [the] protester's proposed project management, together with the slippage in budget and schedules of the protester's completed projects, [caused] serious concern to the committee. This concern was the basic reason we concluded that the protester should not be pre-qualified."

In reply to the contracting officer's statement, the protester made the following points:

-- The committee was "just plain wrong" to downgrade Schlosser's experience based on the fact that its projects have run over the original amount and were completed beyond the original completion date. The delays and cost overruns were not Schlosser's fault, as evidenced by the fact that no liquidated damages were assessed against Schlosser.

-- "It is unfair to conclude that just because a project is late, the contractor is at fault." The protester gives examples of instances in which additional work was required, which, in turn, required additional time. Schlosser also was issued change orders when asbestos was discovered, requiring additional money and time.

-- "Rather than a negative indication, late completion and cost overruns can actually be the result of an Owner's positive experience with the contractor." Schlosser claims as example a contract with GSA in which it was asked to perform additional work which otherwise would have been the subject of separate solicitations. "Due to the extra work, Schlosser has stayed on the job for about two . . . additional years."

-- The evaluators should not have focused on the proposed project manager and superintendent. In so doing, they "failed to recognize that Schlosser employs a multi-tiered system of project management . . . [which] guarantees that each project receives the highest level of supervision and expertise in every phase of project management."

-- Schlosser's designated project manager, although having managed only one other project, has 35 years of construction experience, in which he "has been involved in virtually every type of building renovation project."

-- The protester admits that the evaluators might have considered its designated superintendent relatively inexperienced because Schlosser mistakenly omitted his resume from its submission. In fact, the protester states, he has over 25 years of "relevant construction experience."

The protester sums up by stating:

It should be noted that the final contract prices on the listed projects was the *agreed* final contract price. In other words, in each case, the Owner agreed

proposed for the key positions persons with "substantial experience" in those positions, and they had "more varied, and relevant education and experience than . . . the persons proposed by the protester."

that Schlosser performed work in addition to the base contract work for which Schlosser was entitled to compensation. In virtually all listed instances, this additional contract work resulted in the increased contract duration. In none of the listed situations was Schlosser held to be at fault for the extended contract duration.

(Emphasis in original.)

In a protest conference, the protester's counsel emphasized Schlosser's qualifications and restated his objection to the practice of limiting the number of offerors through prequalification. He also emphasized that Schlosser's designated personnel are highly qualified, and that Schlosser has prequalified in the past for Postal Service construction contracts. He also argued that it was arbitrary and unreasonable for the evaluators to downgrade Schlosser because of completion dates or costs that were later or higher than original projections, stating that individuals knowledgeable about the construction business should have realized that those facts can be a "positive reflection" on a contractor. Schlosser's attorney produced letters from agencies for which Schlosser has performed contracts which state that Schlosser performed well and that delays and cost overruns were not its fault (due to such circumstances as differing site conditions). He admitted that Schlosser did not attach those letters to its prequalification package or otherwise offer any explanations for the delays and costs with their package, but asserted that "it never occurred" to Schlosser that its package could be downgraded because of such statistics. He also suggested that the prequalification forms offered no room for explanations.

Two firms commented on this protest. While not formally protesting, one company that was not prequalified expressed surprise that it was "determined unqualified" and complained that the prequalification package's format was "simple questions and answers which do not seem to require or encourage elaborate details." This firm also alleged that the entire process was "ambiguous;" that it "was not entirely evident whether we were in a competition with other contractors or with established criteria for which the Postal Service would grant a highly qualified rating."

One company which was prequalified expressed its belief that the Postal Service "conducted a fair and thorough analysis of the prequalification statements which resulted in the six highest rated firms being qualified to bid."

DISCUSSION

We first address matters of jurisdiction. By its terms the prequalification package allowed the evaluators to limit the number of firms prequalified, as long as there were at least three. By claiming that the evaluators should not have limited the number, Schlosser is making

an untimely protest against the terms of the solicitation.⁸ PM 4.5.4 b. Further, by arguing against the prequalification process and the PM provision which allows contracting officers to choose as few as three firms, Schlosser is protesting PM regulations which, as the contracting officer's response pointed out, have the force and effect of law. 39 CFR 601.100. Challenges to the PM are beyond the protest jurisdiction of this office. *EnPro Corporation*, P.S. Protest No. 91-48, October 9, 1991. Since the evaluators, in prequalifying six firms, acted in accordance with the solicitation and the applicable procurement regulations, there is no legal authority for us to direct them to choose more than six.⁹

We turn to the remaining issue, whether Schlosser's prequalification package was properly and fairly evaluated--whether it was reasonable for the evaluators to choose the six prequalified firms over Schlosser. This office plays a limited role in reviewing the technical evaluation of prequalification or similar information submitted by a potential offeror. Such a review affords considerable discretion to the contracting officer and the evaluators. *Daniel J. Keating Construction Company*, P.S. Protest No. 89-92, March 1, 1990. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. *Id.*; see *Southern Air Transport*, P.S. Protest No. 89-56, October 3, 1989. The protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers. *Id.* Accordingly, we reviewed the evidence on the record to determine whether it supports Schlosser's contentions of arbitrariness, inconsistency or unequal treatment.¹⁰ In this case, it does not.

We looked at the six prequalifying submissions and their respective evaluations *in camera*, as well as the submission and evaluation of the protester.¹¹ That record does not support a finding that the protester was unfairly or inconsistently evaluated. Each of those firm's evaluation was consistent with the information in its submission, and of the seven firms, Schlosser ranked seventh in total ratings. The evaluators considered Schlosser's

⁸ A prequalification package is to be considered a solicitation for the purposes of our protest regulations. *J.W. Bateson Company, Inc.*, P.S. Protest No. 88-44, November 1, 1988, following *Santa Fe Engineers*, Comp. Gen. Dec. B-218268, June 3, 1985, 85-1 CPD 631. Pursuant to PM 4.5.4 b. a protest against the terms of a solicitation, the basis of which is apparent on the face of the solicitation, is timely if it is received before responses to the solicitation are due.

⁹ The record does not indicate either that the choice of six as the number of firms to be prequalified was improperly predetermined or that there were insignificant differences between the firms deemed most highly qualified and the others. *Cf. J.W. Bateson Company, Inc.*, P.S. Protest No. 88-52, November 1, 1988.

¹⁰ The evaluation of a proposal must be based on factors outlined in the solicitation, and contractors submitting prequalification packages are entitled to the same consistent application of stated evaluation criteria, not only to their own proposals but to their competitors' as well. *Daniel J. Keating*, *supra*.

¹¹ We did not review the submissions or evaluations of the nonprequalified firms other than Schlosser, nor were we provided a ranking which established Schlosser's standing *vis a vis* those firms.

submission clearly deficient under the two most important evaluation criteria, experience and project management, and they accordingly ranked the protester lower than the prequalified firms, several of which listed more comparable projects than did Schlosser and fewer numbers of projects with cost overruns, and all of which reported fewer delays. The evaluators' conclusion that Schlosser's designated project manager and superintendent were less qualified than those of the prequalified firms also is consistent with the evidence.¹² Our review of the record thus does not provide a basis for overturning the evaluators' judgment.¹³

The protester asserts that it was arbitrary to exclude Schlosser because of the project dollar amounts and dates listed on its prequalification forms. Considering that the three evaluators were "highly qualified professional[s] . . . who, collectively, have experience in . . . construction . . . and related matters" (RE-14 210.20, footnote 4, *supra.*), the protester's contention that construction professionals should have understood, without explanation, that Schlosser's record actually reflects positively on the company is unpersuasive. That the other offerors did not indicate similar delays and overruns underscores the illogic of the protester's claim that the evaluators should have known automatically that Schlosser's were not its fault.

On the contrary, it is the protester which should have realized what its unexplained statistics would indicate and which should have attached explanations. While it is true that there was no room on the Part C forms for explanations where project dollar amounts and dates were listed, there was ample opportunity to attach additional sheets on which the protester easily could have entered the alleged "agreed" upon amounts and dates. It could have explained its numbers in its introductory letter or attached its letters of recommendation. (See footnote 6.) The Management section also afforded the opportunity to attach a variety of narrative descriptions.

The evaluation committee chairman indicated that experience and management grades were based on the firms' submissions. Under the terms of the solicitation, there was no burden on the evaluators to seek out pertinent information; therefore, they acted reasonably in taking Schlosser's submission on its face. See *Government Contract Advisory Services, Inc.* and *B & B General Contracting, Inc.*, P.S. Protest Nos. 93-21, 93-25, December 16, 1993. On the other hand, the burden was on the protesters to submit adequately written and complete packages. *Service America Corporation*, P.S. Protest

¹² Schlosser has admitted its mistake in omitting its designated project superintendent's resume, which indicates his 25 years of general construction experience. However, the evaluators had several reasons other than the superintendent's experience for evaluating the protester lower than the prequalified firms, and the evidence indicates that the missing resume would not have changed Schlosser's standing in the evaluations. Compare *Hratch Kouyoumdjian & Associates, Inc.*, P.S. Protest No. 93-03, April 16, 1993.

¹³ Compare *Daniel J. Keating, supra.*, in which the protest was sustained because the evaluation criteria were not equally or rationally applied, and the protester met its burden of proof to overcome the presumption of correctness accorded the contracting officer's actions; and *Kleinknecht Mechanization Group*, P.S. Protest No. 92-24, October 2, 1992, where the protester also met its burden of proof and showed that its evaluation was not consistent with the evidence on the record, that offerors were treated inconsistently, and that evaluations were not in accordance with the terms of the synopsis or solicitation.

No. 91-56, October 30, 1991. "Any reduction in the evaluation scoring that results from an incomplete proposal is attributable only to the offeror." *Id.*; see also, *Hill's Capitol Security*, P.S. Protest No. 90-25, July 20, 1990; *Chamberlain Manufacturing Corporation*, P.S. Protest No. 85-83, February 14, 1986; accord, *ATI Industries*, Comp. Gen. Dec. B-215933, November 19, 1984, 84-2 CPD 540; *Marvin Engineering Co., Inc.*, Comp. Gen. Dec. B-214889, July 3, 1984, 84-2 CPD 15.¹⁴

The protest is dismissed in part and denied in part.

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¹⁴ It should be noted that the protester was under the impression that it was found to be unqualified to perform the work required under the contract at issue here. That is not the case; rather Schlosser was not considered one of the *most highly qualified* firms. It is that finding which we reviewed and determined had a reasonable basis.